COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-574

COMMONWEALTH

vs.

IRVIN SANCHEZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After an evidentiary hearing on the defendant's motion to suppress, the judge allowed the motion.[1] The Commonwealth appeals, arguing that, while some of the police officers' actions violated the defendant's rights, the evidence at issue inevitably would have been discovered lawfully. We disagree and affirm the allowance of the defendant's motion.

The defendant, Irvin Sanchez, was indicted by a grand jury for trafficking in heroin in violation of G. L. c. 94C, § 32E (c) (2); unlawful possession of a class A substance, heroin, with intent to distribute, in violation of G. L. c. 94C, § 32

[1] The Commonwealth filed a timely application to the Supreme Judicial Court, seeking leave to pursue an interlocutory appeal. A single justice allowed the Commonwealth's petition and ordered the case transferred to this court. See Mass. R. Crim. P. 15 (a) (2), as amended, 476 Mass. 1501 (2017).

(a); and assault and battery on a police officer, in violation of G. L. c. 265, § 13D.

Background. We supplement the judge's findings with uncontested facts from the record. On April 3, 2017, at approximately 3:30 P.M., Massachusetts State Trooper Adam Cardin was patrolling Main Street in Springfield when he observed a Nissan sedan fail to stop for a pedestrian in a crosswalk. Cardin stopped the car and observed three occupants, the driver and two passengers. The rear-seat passenger, later identified as the defendant, was not wearing a seat belt.

Cardin asked the driver for his driver's license and the car registration and the driver complied; his license was valid, but the car was a rental vehicle and the sticker on the license plate indicated that the registration had expired. Intending to issue the defendant a citation for failure to wear a seat belt, Cardin asked him for his identification. The defendant asked why, and Cardin explained the seat belt violation. Springfield Police Officer Robert Bohl and Trooper Norman Stanikmas subsequently arrived to assist Cardin. Cardin reported that the defendant "had been giving him a 'hard time' about producing his

identification."[2] However, Sanchez provided his identification to Stanikmas.

Because the registration had expired, Cardin arranged for the car to be towed and ordered the occupants, including the defendant, out of the vehicle.[3] Cardin intended to conduct an inventory search of the car pursuant to Massachusetts State Police policy. As the defendant got out of the car, Stanikmas, intending to conduct a patfrisk, grabbed the defendant's hands and "secured them." The defendant pulled away and ran. The three officers chased him briefly, but stopped when the defendant climbed over a fence. The officers returned to the car and began an inventory search. In the center console, they found an electric stun gun. The driver and the other passenger denied ownership of the stun gun. Nonetheless, both were arrested and charged with possession of it.

Shortly thereafter, the defendant was apprehended by Springfield Police Officer Marcos Hernandez. Hernandez reported that the defendant "pushed" him when he attempted stop him. Hernandez then arrested the defendant and brought him back to the scene of the traffic stop. When the officers searched the defendant's person, they discovered $1,297 in cash. Bohl

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[2] The judge found that "[i]t was . . . reasonable for [the defendant] to ask the reason for the request; it did not constitute giving Cardin 'a hard time.'"

[3] The driver was already out of the car.

retraced the route the defendant had taken when he ran away and located a plastic bag containing 2,000 bags of heroin. The bags of heroin were packaged in packs of one hundred.

On the basis of these facts, the judge concluded that the traffic stop, the request for the defendant's identification because of the seat belt violation, and the subsequent inventory search of the car were lawful. The defendant does not disagree.

However, the judge also concluded that "Trooper Stanikmas did not have a reasonable suspicion that [the defendant] was involved in criminal activity when he told him to exit the car, nor did he have a reasonable belief that [the defendant] was armed. His justification for the pat frisk was that there were three occupants, they were going to be out of the car, [the defendant] had previously been hesitant to produce his identification, and it was a high crime area." The judge rejected this rationale, finding that the officers were not outnumbered; Main Street in Springfield at 3:30 P.M. was not a high crime area;[4] and, significantly, "even if a traffic stop occurs in a high crime area, that circumstance alone does not permit the police to order an occupant out of a vehicle to conduct a pat frisk."

[4] Stanikmas testified that "all of Springfield" was a high crime area.

Given the judge's findings, the Commonwealth concedes that the "attempted pat frisk" was improper. The Commonwealth also concedes that "the defendant's acts of pulling away from Trooper Cardin, fleeing, discarding the contraband, and pushing Officer Hernandez as he was attempting to take the defendant into custody did not rise to a level constituting sufficient independent and intervening acts to dissipate the taint of the unlawful seizure."

Instead, the Commonwealth argues that, once the stun gun was discovered in the inventory search, the police also had probable cause to arrest the defendant for illegal possession of the weapon and would have discovered the drugs and money at that point. The validity of that argument is the sole issue posed here.[5] The motion judge concluded that the inevitable discovery doctrine did not apply because he was "not satisfied that the police would have had probable cause to arrest [the defendant],

[5] The Supreme Judicial Court has since concluded "that the absolute prohibition against civilian possession of stun guns under [G. L. c. 140,] § 131J[,] is in violation of the Second Amendment [to the United States Constitution]." Ramirez v. Commonwealth, 479 Mass. 331, 332 (2018). The judge noted the issue in his findings, but did not address it because of his conclusion that there was no probable cause to charge the defendant with that offense, and the defendant was not indicted for possession of the stun gun. In addition, the search took place before Ramirez was decided; neither party has asked us to address that issue in this case. (We note that § 131J was amended following the court's decision in Ramirez.)

a back seat passenger, for possession of the stun gun found in the front console of a car that he did not own."

Discussion. "When reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings absent clear error but conduct an independent review of his ultimate findings and conclusions of law." Commonwealth v. Leary, 92 Mass. App. Ct. 332, 336 (2017). "The judge determines the weight and credibility of the testimony." Commonwealth v. Woods, 466 Mass. 707, 717, cert. denied, 573 U.S. 937 (2014). However, we "make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found." Id., quoting Commonwealth v. Mercado, 422 Mass. 367, 369 (1996).

"Under the inevitable discovery doctrine, evidence may be admissible as long as the Commonwealth can demonstrate that discovery of the evidence by lawful means was certain as a practical matter, the officers did not act in bad faith to accelerate the discovery of evidence, and the particular constitutional violation is not so severe as to require suppression. In addition, the discovery must have been inevitable under the circumstances existing at the time of the unlawful seizure." (Quotations and citations omitted.) Commonwealth v. Campbell, 475 Mass. 611, 622 (2016). This test is considered "demanding." Hernandez, 473 Mass. 379, 386 (2015), quoting Commonwealth v. Balicki, 436 Mass. 1, 16 (2002).

"To sustain this assertion, the Commonwealth has the burden of proving the facts bearing on inevitability by a preponderance of the evidence and, once the relevant facts have been proved, that discovery by lawful means was certain as a practical matter" (quotations and citations omitted). Balicki, supra.

Here, the judge was "not satisfied that the police would have had probable cause to arrest the defendant, a back seat passenger, for possession of the stun gun found in the front console of a car that he did not own." Whether there was probable cause to arrest the defendant is a close question, one which we need not decide because, even if we were to assume that the police had probable cause to arrest the defendant for possession of the stun gun, the Commonwealth failed to prove by a preponderance of the evidence that it was certain -- or clearly inevitable -- that, as a practical matter, the defendant would have been arrested at the scene.

To begin with, the defendant might have departed after receiving his citation, and it is not at all unlikely, given all of the circumstances, that this defendant would have done so. See Commonwealth v. Crowley-Chester, 476 Mass. 1030, 1030 (2017) (where driver was arrested, passenger, "who was not yet under arrest . . . was free to leave the scene"). For that reason, it cannot be said that it is "virtually certain" that the officers would have discovered the evidence. See Balicki, 436 Mass. at

16 ("In this context, 'inevitable' means that it must be either 'certain as a practical matter' or 'virtually certain' that the officers would have discovered the evidence by lawful means"). Not only is it not "certain" that the defendant would have been present at the time the stun gun was found, but even if he were present, it is not certain that the police would have arrested him at the scene.

The fact that the police later might have developed probable cause to arrest the defendant for the stun gun does not assist the Commonwealth here. See Commonwealth v. White, 475 Mass. 583, 596 (2016) ("'The general rule is that evidence is to be excluded if it is found to be the "fruit" of a police officer's unlawful actions.' . . . Balicki, 436 Mass. [at] . . . 15 . . ., citing Wong Sun v. United States, 371 U.S. 471, 484 [1963]. Where an item is seized without probable cause, the item and its 'fruits' may not be introduced in evidence. See Commonwealth v. Keefner, 461 Mass. 507, 518 [2012], quoting Wong Sun, supra at 488 . . . . That probable cause for a seizure emerges at some point after the seizure occurred does not alter this conclusion [emphasis added]).

Because we conclude that it was not inevitable that the evidence in question would have been discovered, we affirm the

order allowing the defendant's motion to suppress.

So ordered.

By the Court (Vuono, Hanlon & Shin, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: August 28, 2019.

[6] The panelists are listed in order of seniority.